No. 205. 45

Br. of Case for Respondent.

Supreme Court of the United States.

Office Supreme Court U. S.
FILED
MAY 1 1899
JAMES H. McKENNEY,
Clerk

October Term, 1898.

Filed May 1, 1899

H. DRUSILLA MITCHELL, Petitioner,

vs.

THE FIRST NATIONAL BANK OF CHICAGO, Respondent.

Petition for a writ of Certiorari to United States Circuit Court of Appeals for the Second Circuit, in the case of The First National Bank of Chicago, Plaintiff in Error, vs. H. Drusilla Mitchell, Defendant in Error.

Statement and Brief

FOR RESPONDENT.

CASE & BRYANT of Counsel.

HARTFORD, CONN.:
THE CASE, LOCKWOOD & BRAINARD COMPANY, PRINTERS
1899.

Supreme Court of the United States.

October Term, 1898.

H. DRUSILLA MITCHELL, Petitioner,

vs.

THE FIRST NATIONAL BANK OF CHICAGO, Respondent.

Petition for a writ of Certiorari to United States Circuit Court of Appeals for the Second Circuit, in the case of The First National Bank of Chicago, Plaintiff in Error, vs. H. Drusilla Mitchell, Defendant in Error.

Statement and Brief

For Respondent, Plaintiff in Error.

STATEMENT.

On the 30th day of December, 1895, the First National Bank of Chicago brought suit against H. Drusilla Mitchell and G. H. Mitchell, her husband, both of Bristol, Conn., in the Circuit Court of the United States for the District of Connecticut, claiming $30,000 damages. This suit was commenced by writ of summons and attachment, and by virtue of said writ, property of the said H. Drusilla Mitchell amply sufficient to secure the claim was levied upon.

The facts upon which said suit was brought are as follows: H. Drusilla Mitchell has always resided in Bristol in this state. In 1857 she was there married to George H. Mitchell, and they continued to reside there until his death in 1896, and she resides

there still. He was a member of the mercantile firm of Morse, Mitchell & Williams, located at Chicago; and there the other two partners lived. On February 20, 1891, the firm being indebted to the First National Bank of Chicago over $20,000, upon their notes, the following paper was executed to said bank at Chicago, by the firm and each of its members.

> " We hereby request the First National Bank of Chicago to give and continue to Morse, Mitchell & Williams credit as they desire from time to time, and, in consideration of all and any such credit given we hereby guarantee any and all indebtedness now due, or which may hereafter become due, from them to said bank, to the extent of $30,000, and waive notice of the acceptance of this guaranty and of any and all indebtedness at any time covered by the same. This guaranty shall continue until written notice from us of the discontinuance thereof shall be received by said The First National Bank of Chicago.
>
> "MORSE, MITCHELL & WILLIAMS,
> " FRANCIS E. MORSE,
> " FREDERICK C. WILLIAMS,
> " G. H. MITCHELL.
>
> " Chicago, Ill., February 20, 1891."

Said paper was prepared by the bank which had agreed with said firm to continue the line of credits to it, upon the execution of said paper by said firm and its individual members, and by Mrs. H. Drusilla Mitchell, then at her home in said Bristol. George H. Mitchell thereupon took said paper and brought it with him to his residence at Forestville in the town of Bristol, and there procured his wife, H. Drusilla Mitchell, to sign the same, and it was thereafter by him enclosed, addressed, and sent by mail to said Morse in Chicago, who delivered it to said bank.

Said bank continued to extend credit to Morse, Mitchell & Williams until the firm became insolvent and made an assignment for the benefit of its creditors on July 30, 1893. At the time of such insolvency and assignment, said bank held and owned the notes of Morse, Mitchell & Williams, renewals of unpaid portions of said first-mentioned notes, for $16,500, and

also sundry other notes of third parties endorsed by said firm. All these notes were payable at Chicago, and they have never been paid.

On the day of February, 1896, days before the attachment lien would have become perfected by the laws of Connecticut, H. Drusilla Mitchell made a voluntary assignment in insolvency under the statute law of Connecticut, and a trustee, one Edward A. Freeman, was appointed by the Probate Court of Bristol on her estate, represented by her to be insolvent.

On the 6th day of March, 1896, George H. Mitchell died.

Commissioners were appointed on Mrs. Mitchell's estate, and the bank presented the claim herein involved to them, and it was allowed, and the case was taken by her trustee in insolvency by appeal to the Superior Court, and upon reservation to the Supreme Court of Errors in Connecticut, where precisely the same facts were presented and passed upon (Record, p. 19).

This appeal was argued January 13, 1897, and decided February 23d following (Freeman's Appeal from Commissioners, 68 Conn., p. 533), and in June thereafter the suit brought by the bank against the Mitchells, December, 1895, came to trial in the Circuit Court before Judge Townsend, who decided adversely to the plaintiff, upon the grounds and for the reasons set forth in the Record, pp. 69–73.

Referring to Freeman's Appeal, Judge Townsend says in his memorandum of decision:

> "The court there held that defendant, being a married woman, had no capacity to make any such contract; that to sign the guaranty in Connecticut and to authorize her husband as her agent to deliver the guaranty at Chicago was to enter into a contractual relation in Connecticut which she had no capacity to do; that, therefore, she could not, while in Connecticut, authorize her husband to take the guaranty to Chicago and deliver it, and that, therefore, it was never delivered by her." (Record, p. 70.)

Again, in conclusion (Record, p. 73):

> "In these circumstances, I think, it is the duty of this court to follow the decision of the Connecticut court of last resort. Let judgment be entered for defendant."

Whereupon the First National Bank brought its writ of error to the Circuit Court of Appeals, which, on March 1st, reversed the decision which Judge Townsend had rendered in accordance with his idea that it was his duty to follow the Connecticut decision, Freeman's Appeal.

BRIEF.

The petitioner's claims for a removal of this action to this court for review, as stated in paragraphs 10 and 11 of her petition seem to be —

(1st) That the Circuit Court of Appeals erred in holding "that the case depended not upon the constructions of the local law of the State of Connecticut, but upon the application of the principles of general jurisprudence."

(2d) That the Court of Appeals erred in holding that the action could be maintained in the Circuit Court, notwithstanding the refusal of the courts of Connecticut to permit like action to be maintained in their jurisdiction," and

(3d) That it is unseemly and confusing that there should be diverse judgments between a federal court, sitting in that state, and the highest court of that state.

As to the first reason, the question involved did not in any way depend upon local law. The question was not whether Mrs. Mitchell could make a contract of guaranty in Connecticut. The question was not whether, according to Connecticut law, she possessed contractual ability, but whether, according to princi-

ples of general jurisprudence, a given act, to wit, power to mail a letter in person or by messenger, required contractual ability anywhere.

The court, in Freeman's Appeal, conceding the ability of Mrs. Mitchell to sign the paper in Connecticut and take it in person to Chicago and deliver it, and thereby make a contract enforceable in Chicago, and by comity enforceable in Connecticut, denied her ability to accomplish the same result by handing the signed paper to her husband to mail in Connecticut to Chicago.

This was not a local question, — not a question whether Mrs. Mitchell could make a contract of guaranty in Connecticut. We do not claim she could. It was, we repeat, a question as to whether the doing of a given act required contractual ability and is to be settled by the application of general principles of law in force everywhere.

As to petitioner's second reason, to wit, that the Circuit Court decides that by comity this action can be maintained in the federal court in the district, while the highest state court decides that it cannot in the state courts, our reply is that no such reason exists in fact. The court in Connecticut decided that no contract whatever existed. The question of comity never arose. The Connecticut court decided that the contract could not be enforced in Connecticut because there was no contract. The Circuit Court of Appeals decides that there was a contract — an Illinois contract — which is enforceable in the federal court for Connecticut. And Freeman's Appeal concedes that if there is an Illinois contract it is enforceable in Connecticut.

And to the third reason, to wit, the importance of harmonizing diverse judgments, a brief recurrence to the facts will, perhaps, be of service.

The plaintiff, a citizen of Illinois, came to Connecticut — as it was obliged to do — to bring the defendant into court; and, in the exercise of its constitutional right to the choice of a forum,

brought its suit in the Circuit Court of the United States and secured its claim by the attachment of defendant's property.

At that time the decided cases throughout the United States were favorable to the claims of the First National Bank of Chicago, to wit, that the contract of guaranty in question was an Illinois contract, and enforceable as such in Connecticut.

Milliken *vs.* Pratt, 125 Mass., 374.
Hill *vs.* Chase, 143 Mass., 129.
Bell *vs.* Packard, 69 Me., 105.
Wright *vs.* Remington, 41 N. J., see 48.
Baum *vs.* Birchall, 24 At. R., 629.
Phœnix Mut. Life Ins. Co. *vs.* Simon, 52 Mo. App., 357.
Bowles *vs.* Field, 78 Fed. R., 742.

And it was upon the authority of these cases that the bank proceeded to institute its suit.

But Mrs. Mitchell, after this suit was commenced and just before the attachment lien became perfect, made a voluntary assignment in insolvency under the laws of Connecticut, to a trustee for the benefit of creditors, who, she says, exist, and whom, she says, she is unable to pay. And it is her claim that by this act the federal court is practically ousted of jurisdiction in favor of the state courts of Connecticut. Commissioners were appointed by the Probate Court of Bristol in Connecticut to pass upon the validity of claims against her estate — the plaintiff's claim among the rest; and thus, while we waited in the federal court, the question of our claim was diverted to the state court by the arbitrary act of the defendant, and reached decision in the case of Freeman's Appeal.

This decision in favor of the trustee in insolvency of Mrs. Mitchell's estate was in no way a bar to the previously-commenced suit against Mrs. Mitchell herself in the federal court. It was the right of the bank to pursue its suit in the federal court, and we respectfully submit it was the duty of the court to treat the

question involved as the Circuit Court of Appeals has treated it, as a question to be determined by no law peculiar to any state, and not at all dependent upon local authority, but it is to be decided according to the general and uniform law which governs every court in the land.

> "It is settled doctrine that the federal courts, in the exercise of their co-ordinate jurisdiction, are not bound by the decisions of the state courts upon subjects of general law, but are at liberty to follow the convictions of their own judgment.
>
> Swift *vs.* Tyson, 16 Pet., 1.
> Railroad Co. *vs.* National Bank, 102 U. S., 14.
> Burgess *vs.* Seligman, 107 U. S., 20; 2 Sup. Ct., 10.
> Myrick *vs.* Railroad Co., 107 U. S., 102; 1 Sup. Ct., 425.
> Railway Co. *vs.* Prentice, 147 U. S., 106; 13 Sup. Ct., 261.
> Philips *vs.* Harding, 70 Fed. Rep., 471."

> "So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued."

Burgess *vs.* Seligman, *supra*, p. 33.

Now, it is claimed that the judgments in the First National Bank of Chicago *vs.* H. Drusilla Mitchell in the Circuit Court of Appeals for the Second Circuit, and in Freeman's Appeal in the Supreme Court of Connecticut, are diverse, and for that reason the judgment in the first-named case should be reviewed by this court.

We respectfully submit that the circumstances under which the petitioner comes here, and which we have recited, do not entitle her to any favor, and the mere fact of the existing diver-

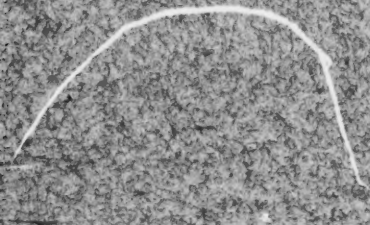
sity is not enough to entitle the petitioner to a review as a matter of right.

Lau on Bew's case, 141 U. S., 583, and 144 U. S., 47.
In *re* Woods, 143 U. S., 202.
Amer. Const. Co. *vs.* Jacksonville Railway, 148 U. S., 383.

Upon the ground we are now discussing, to wit, the desirability of securing uniformity of decision, no useful purpose can be served by a review which must terminate either in maintaining the present diversity of decision or in creating a similar diversity between the federal court and the Supreme Courts of Massachusetts, Maine, New Jersey, Pennsylvania, Missouri, and also the Circuit Court for the District of Indiana, so that review cannot secure uniformity of decision, but may create a much greater diversity.

Forsyth *vs.* Hammond, 166 U. S., 506, is not in point here, because in that case the diversity of decision was upon the subject of a local law of the state in which the federal court should have followed the decision of the Supreme Court of the State.

WM. C. CASE,
PERCY S. BRYANT,
Of Counsel for Respondent.



Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 280.

H. DRUSILLA MITCHELL, *Petitioner,*

vs.

THE FIRST NATIONAL BANK OF CHICAGO, *Respondent.*

Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

STATEMENT AND BRIEF FOR RESPONDENT.

On the 30th day of December, 1895, the First National Bank of Chicago brought suit against H. Drusilla Mitchell and G. H. Mitchell, her husband, both of Bristol, Conn., in the Circuit Court of the United States for the District of Connecticut, claiming $30,000 damages. This suit was commenced by writ of summons and attachment, and by virtue of said writ, property of the said H. Drusilla Mitchell amply sufficient to secure the claim was levied upon.

The facts upon which said suit was brought are as follows: H. Drusilla Mitchell has always resided in Bristol in the state of Connecticut. In 1857 she was there married to George H. Mitchell, and they continued to reside there until his death in 1896, and she resides there still. He was a member of the mercantile firm of Morse, Mitchell & Williams, located at Chicago; and there the other two partners lived. On February 20, 1891, the firm being indebted to the First National Bank of Chicago over $20,000, upon their notes, the follow-

ing paper was executed to said bank at Chicago, by the firm and each of its members.

> "We hereby request the First National Bank of Chicago to give and continue to Morse, Mitchell & Williams credit as they desire from time to time, and, in consideration of all and any such credit given, we hereby guarantee any and all indebtedness now due, or which may hereafter become due, from them to said bank, to the extent of $30,000, and waive notice of the acceptance of this guaranty and of any and all indebtedness at any time covered by the same. This guaranty shall continue until written notice from us of the discontinuance thereof shall be received by said The First National Bank of Chicago.
>
> "Morse, Mitchell & Williams,
> "Francis E. Morse,
> "Frederick C. Williams,
> "G. H. Mitchell.
>
> "Chicago, Ill., February 20, 1891."

Said paper was prepared by the bank which had agreed with said firm to continue the line of credits to it, upon the execution of said paper by said firm and its individual members, and by Mrs. H. Drusilla Mitchell, then at her home in said Bristol. George H. Mitchell thereupon took said paper and brought it with him to his residence at Forestville in the town of Bristol, and there procured his wife, H. Drusilla Mitchell, to sign the same, and it was thereafter by him enclosed, addressed, and sent by mail to said Morse in Chicago, who delivered it to said bank.

Said bank continued to extend credit to Morse, Mitchell & Williams until the firm became insolvent, and made an assignment for the benefit of its creditors on July 30, 1893. At the time of such insolvency and assignment, said bank held and owned the notes of Morse, Mitchell & Williams, renewals of unpaid portions of said first-mentioned notes, for $16,500, and also sundry other notes of third parties endorsed by said

firm. All these notes were payable at Chicago, and they have never been paid.

On the 28th day of February, 1896, a few hours before the attachment lien would have become perfected by the laws of Connecticut, H. Drusilla Mitchell made a voluntary assignment in insolvency under the statute law of Connecticut, and a trustee, one Edward A. Freeman, was appointed by the Probate Court of Bristol on her estate, represented by her to be insolvent.

On the 6th day of March, 1896, George H. Mitchell died.

Commissioners were duly appointed on Mrs. Mitchell's estate by the Probate Court to receive and pass upon the claims against her estate, in accordance with the Insolvent Laws of Connecticut, and the bank presented its claim herein involved to them. It was by them allowed; whereupon Mrs. Mitchell's trustee in insolvency took an appeal from their decision to the Superior Court, and upon reservation, the cause went from that court to the Supreme Court of Errors of Connecticut, where the precise questions upon the same facts here presented were argued and passed upon.

This appeal was argued January 13, 1897, and decided February 23d following (Freeman's Appeal from Commissioners, 68 Conn., p. 533), and in June thereafter the suit brought by the bank against the Mitchells, December, 1895, came to trial in the Circuit Court for the District of Connecticut before Judge Townsend, who decided adversely to the plaintiff, upon the grounds and for the reasons set forth in the Record, pp. 11-13.

Referring to Freeman's Appeal, Judge Townsend says in his memorandum of decision:

"The court there held that defendant being a mar-

> ried woman, had no capacity to make any such contract; that to sign the guaranty in Connecticut and to authorize her husband as her agent to deliver the guaranty at Chicago was to enter into a contractual relation in Connecticut which she had no capacity to do; that, therefore, she could not, while in Connecticut, authorize her husband to take the guaranty to Chicago and deliver it, and that, therefore, it was never delivered." (Record, p. 11.)

Again, in conclusion (Record, p. 13):

> "In these circumstances, I think, it is the duty of this court to follow the decision of the Connecticut court of last resort. Let the judgment be entered for defendant."

Whereupon the First National Bank of Chicago brought its writ of error to the Circuit Court of Appeals for the Second Circuit, assigning as the ground of error that the Circuit Court had erred in holding that Exhibit "A" (Record, page 6) was not a contract of guaranty made in Chicago, in accordance with the laws of Illinois and enforceable in the Circuit Court, within and for the District of Connecticut.

The Circuit Court of Appeals sustained the contention of the bank and reversed the decision of the court below (Judge Lacombe dissenting), and rendered judgment for the plaintiff on the first day of March, 1899; and the defendant in error, on the 27th day of May, 1899, filed her petition to this court for a writ of *certiorari,* which petition was granted and the cause removed here.

> "The question in the case is whether a guaranty,
> "payable in the state of Illinois, and delivered to the
> "plaintiff there, signed by a married woman, at her
> "domicile, in Connecticut, to enable her husband to
> "procure credit with the plaintiff, delivered by her to
> "her husband, and sent by him by mail to the plaintiff,

" is a valid contract; she being disqualified by the law
" of Connecticut from making a contract as surety,
" and authorized to do so by the laws of Illinois. In
" other words, the question is whether the incapacity
" to contract by the law of the state of a person's dom-
" icile attaches to his contractual act in another state,
" where the disability has been removed."

First Nat. Bank of Chicago vs. Mitchell et al., 92 Fed. Rep., 565.

BRIEF.

Where in contemplation of law was the contract made, and by what law governed? Upon this point there is hardly room for controversy. The paper was signed in Connecticut, but it was delivered to the bank at Chicago and it was there that it became a contract. The mere signing of the paper does not make or locate a contract.

Daniel on Negotiable Instruments, Vol. 1, Sècs. 866 and 868.
Rorer Inter-State Law, pp. 49, 50.
Phoenix Mutual Life Ins. Co. vs. Simon Mo. App., 357.
Baum vs. Birchall, 150 Pa. St., 164, 24 Atl. R., 629.
Bell vs. Packard, 69 Me., 105.
Hill vs. Chase, 143 Mass., 129.
Milliken vs. Pratt, 125 Mass., 374.
First Nat. Bank vs. Mitchell et al.

If this paper is a contract at all it will be conceded that it is an Illinois contract to be governed by the law of Illinois at the time of execution, and that law was as follows:

> " Contracts may be made and liabilities incurred by
> " a wife, and the same enforced against her, to the
> " same extent and the same manner as if she were un-
> " married; but except with the consent of her husband,
> " she may not enter into or carry on any partnership
> " business, unless her husband has abandoned or de-
> " serted her, or is idiotic or insane, or is confined in the
> " penitentiary."

Rev. Stat. of Ill., 68, Sec. 6, Ed. of 1881.

The construction of this law by the Supreme Court of Illinois is found in the following cases:

Snell et al. vs. Snell et al., 123 Ill., 403.
Crum vs. Sawyer et al., 132 Ill., 432.

In the first of these cases (Snell et al. vs. Snell et al.), at page 409, the court says:

> "By the Acts of 1861 and 1874 married women "are to-day, and were at the time of the execution of "the mortgage in question, placed upon a common "footing with married men in respect to all property "rights, including the means to acquire, protect, and "dispose of the same. They may own, buy, sell, and "transfer any and all kinds of property, to the same "extent as married men or single women may, and "subject to no other or different conditions or re-"strictions. Not only so, but their duties and obli-"gations in respect to their rights and persons are the "same as those of others *sui juris*. Like other per-"sons they must perform their contracts, and if they "fail to do so, they are amenable to legal process to "the same extent as if they were unmarried."

If, then, Exhibit "A" is a contract made in Chicago and governed by the laws of Illinois, there would seem to be no room for doubt as to its validity as a contract of Mrs. Mitchell and its enforceability in other jurisdictions, and we do not understand that there is really any controversy on that point, even the Supreme Court of Connecticut conceding that in the following language:

> "Had Mrs. Mitchell been within the state of Illinois "when she signed the guaranty it may be that her "personal presence would have so far made her a "resident of that state as to subject her to its laws, in "respect to acts done within its jurisdiction."
>
> Freeman's Appeal, 68 Conn., 561.

But it is the contention of Mrs. Mitchell, in which she is sustained in Freeman's Appeal, that Exhibit "A" is not a contract anywhere.

The court says in effect, Mrs. Mitchell signed the paper and gave it to her husband to send by mail to Chicago — but

this act of sending required contractual ability and she performed it in Connecticut where she had no contractual ability.

That is to say, the opinion of Judge Baldwin concedes, as we understand, that while Mrs. Mitchell might sign the paper in Connecticut and then by taking the paper to Chicago and delivering it in person to the bank make a valid contract, the fact that after signing the paper she gave it to her husband in Connecticut to mail to Morse in Chicago, there to be delivered by him to the bank, is fatal to the validity of Exhibit "A" as a contract.

Our reply to this is, in the language of Milliken vs. Pratt, that if she could make the contract at Chicago by delivery in person she could make it by transmission by a messenger or through the post-office, "just as if the writer personally took the executed contract into the other state, or wrote or signed it there"; and that is what she did and all she did, and it made no difference whether the messenger was her husband or a boy called in from the street.

"It is not the place of delivery that controls, but the power of delivery" (Freeman's Appeal, p. 543). This power she confessedly had. Instead of exercising it by employing some intervening agency to transport herself and the paper to Chicago she puts it in the mail in Connecticut, employing for that purpose the hand of her husband as she might have employed the hand of a stranger.

If it required contractual ability to mail this paper to Morse by the hand of another, then there is a practical denial of the power of delivery, because it is impossible to conceive how she could get the paper to him, even if she carried it herself, without calling to her aid some act of another person as nearly approaching agency as the act of her husband in mailing the letter.

This is too narrow. Confronted by the same state of facts, the Supreme Court of Massachusetts found no reason to say that giving the guaranty to her husband to mail was the creation of an agency by the wife which required contractual ability.

That court distinctly said that by handing the paper to her husband, who transmitted it by mail to Maine, she herself made the contract in Maine, just as if the writer had personally taken the executed contract into Maine or had written or signed it there.

What Judge Baldwin calls the authority of the husband in the present case was no greater than and not different from the authority of the husband in Milliken vs. Pratt. This authority must be determined by the act done, and that was simply the service of a messenger. If that requires contractual ability then and then only can the authority of the Connecticut case be sustained against that of Massachusetts.

The trouble, as it seems to us, with the reasoning of Freeman's Appeal, is that it proceeds upon a confused notion of the *status* of Mrs. Mitchell. . . . "One of its (*i. e.*, Coverture's) incidents was a total disability to contract" (p. 539).

This is not accurate, even according to Freeman's Appeal, p. 541. It should be qualified; total disability to contract in Connecticut. In Bowles vs. Field, 78 Fed. Rep., 743, a case of a contract of suretyship for her husband by a married woman, we find in a discussion of the general subject, the following: "It was provided that a married woman should not enter into any contract of suretyship. It is clear that this limitation on her general power to contract has no extra territorial force. The law of this state could not prevent a married woman from making a contract elsewhere."

The *status* of Mrs. Mitchell contemplated by Judge Baldwin was confined to the limits of Connecticut. It did not extend to Chicago, where this contract of guaranty was made. Yet admitting this, Freeman's Appeal denies her power to make a contract in Chicago by means of a paper signed in Connecticut, for want of contractual ability to get the paper to Chicago for delivery.

This is not a local question. Not a question whether Mrs. Mitchell can make a contract of guaranty in Connecticut. We do not claim she could. It is a question as to whether the doing of a given act required contractual ability and is to be settled by the application of general principles of law in force everywhere.

It is not a question of the construction of any Statute of Connecticut or of any of the peculiarities of the policy of Connecticut law. We are agreed upon these points and Freeman's Appeal is simply a re-affirmation which no one disputes.

It is not even a question whether by comity the courts of Connecticut will enforce a contract made in Chicago; for the decision is that there was no contract at all to enforce and the Connecticut court never reached the question of comity.

It is a question of the extent of the contractual disability incident to coverture, not merely in Connecticut, but wherever it exists by virtue of the common law — it is a question whether a person under the disability of coverture in one state may by the transmission of a message — by mail, by telegraph, or by private messenger — complete a contract in another state where no such disability exists.

And this question is to be determined by no law peculiar to any state, and it is not at all dependent upon local authority, but it is to be decided according to the general and uniform law which governs every court in the land.

It is entirely unnecessary to prolong the discussion of the single question which this record presents, for such discussion would be merely a rehearsal of Milliken vs. Pratt and Bell vs. Packard.

In Milliken vs. Pratt, 125 Mass., 374, the facts were as follows:

> "The plaintiffs are partners doing business in Portland, Maine, under the firm name of Deering, Milliken & Co. The defendant is and has been since 1850 the wife of Daniel Pratt, and both have always resided in Massachusetts. In 1870, Daniel, who was then doing business in Massachusetts, applied to the plaintiffs at Portland for credit, and they required of him, as a condition of granting the same, a guaranty from the defendant to the amount of five hundred dollars, and accordingly he procured from his wife the following instrument:
>
> "'Portland, January 29, 1870. In consideration of one dollar paid by Deering, Milliken & Co., receipt of which is hereby acknowledged, I guarantee the payment to them by Daniel Pratt of the sum of five hundred dollars, from time to time as he may want — this is to be a continuing guaranty. Sarah A. Pratt.'
>
> "This instrument was executed by the defendant two or three days after its date, at her home in Massachusetts, and there delivered by her to her husband, who sent it by mail from Massachusetts to the plaintiffs in Portland; and the plaintiffs received it from the post office in Portland early in February, 1870." (P. 374.)

Gray, *C. J.*, in giving the opinion of the court, says, on page 376:

> "So if a person residing in this state signs and transmits, either by a messenger or through the post office, to a person in another state, a written contract, which requires no special forms or solemnities in its execution, and no signature of the person to whom it is addressed, and is assented to and acted on by him there,

the contract is made there, just as if the writer personally took the executed contract into the other state, or wrote and signed it there."

It is especially to be noted that this language is used with reference to a contract made by a person under the same want of contractual ability or capacity as that claimed for Mrs. Mitchell.

> "The law of Massachusetts, as then existing, did not allow her to enter into a contract as surety or for the accommodation of her husband or of any third person. Gen. Sts., c. 108, s. 3."
>
> Milliken vs. Pratt, pages 376 and 377.

From Bell vs. Packard, 69 Me., 105, we quote the whole statement of the court because it gives concisely the facts and the conclusions of law:

> Virgin, *J.* "On or before March 12, 1873, the "plaintiff, a resident of Skowhegan, holding an over- "due note against the defendant's husband, then a "resident of Cambridge, Mass., wrote the note in suit "and enclosed it in a letter addressed and mailed to "the latter in Cambridge, therein agreeing to surren- "der the old note upon the delivery of the new one "signed by him with a good surety. Accordingly, the "new note was signed by the defendant's husband and "herself, and mailed to and received by the plaintiff "at Skowhegan, who thereupon enclosed the old note "to Packard at Cambridge.
>
> "The case also finds that when the note was signed "by the defendant she was a married woman, and that, "by the law of Massachusetts, she could not thus bind "herself there.
>
> "In this state, however, a married woman may con- "tract for any lawful purpose. (R. S., c. 61, par. 4.)
>
> "Upon these facts the principal question for de- "termination is, where was the note in suit made or to "be paid. For although the personal incompetency

"of the defendant to contract as surety for her hus-
"band in Massachusetts will, so far as all such con-
"tracts made there are concerned, follow her every-
"where, still it will not be regarded as to such con-
"tracts made or to be performed here, where no such
"disqualification is acknowledged. (Polydore vs.
"Prince, Ware, 402.) Story Conft. of Laws, pars.
"101, 102. Our opinion is that the note was made
"and intended by the parties to be paid in Skowhegan.
"For although it was signed in Cambridge, it was de-
"livered to the payee in Skowhegan, and it was not
"a completed contract until delivered. This proposi-
"tion needs no citation or authorities, still we cite
"Lawrence vs. Bassett, 5 Allen, 140, as precisely in
"point."

"These adjudications proceed upon the considera-tions that the instrument was not effective for any pur-pose until delivered to the party for whose benefit it was prepared, that the place where it became operative was the place where the contract was made, and that the disqualification of the married woman in the state of her domicile did not accompany her in making a con-tract in a state where the disqualification had been re-moved. They are a consistent and logical application of that fundamental and most important rule of private international law that a contract valid by the law of the place where it is made is valid everywhere."

First National Bank vs. Mitchell, 92 Fed. Rep., 565.

And the single question is whether the conclusion of the Court of Appeals is right.

WM. C. CASE,
PERCY S. BRYANT,
Counsel.

POSTSCRIPT.

Since this cause was removed to this court by writ of certiorari, the petitioner after the receipt from us of the foregoing brief, has handed us a brief in which for the first time she makes a claim that the question here involved was res judicata by Freeman's Appeal, 68 Conn., 533.

The petitioner's counsel now says that having voluntarily submitted its claim to the test of the laws of Connecticut, the decision of the courts of Connecticut is binding and conclusive upon us, the Chicago National Bank.

The fundamental mistake of petitioner's counsel is, that the question here is a question under the local law of Connecticut. Nothing could be more erroneous.

We beg leave to call the attention to the following extract from First Nat. Bank of Chicago vs. Mitchell et al., 92 Fed. Rep., 567.

> "We are extremely reluctant to differ with the "Supreme Court of Connecticut in a case involving "the same facts, between substantially the same "parties, not only because the opinion of that learned "tribunal is always entitled to great consideration, but "also because it is, in a sense, unseemly that there "should be diverse judgments under such circum-"stances between a federal court sitting in that state "and the highest court of the state. But the case is "one which concerns the rights of a citizen of Illinois, "acquired before the decision of the state court; and "its decision depends, not upon the construction of "local laws, but upon the application of the principles "of general jurisprudence. In such cases the federal

"courts are in duty bound to exercise their own in-
"dependent judgment."

"It is settled doctrine that the federal courts, in the exercise of their co-ordinate jurisdiction, are not bound by the decisions of the state courts upon subjects of general law, but are at liberty to follow the convictions of their own judgment.

Swift vs. Tyson, 16 Pet., 1.
Railroad Co. vs. National Bank, 102 U. S., 14.
Burgess vs. Seligman, 107 U. S., 20; 2 Sup. Ct., 10.
Myrick vs. Railroad Co., 107 U. S., 102; 1 Sup. Ct., 425.
Railway Co. vs. Prentice, 147 U. S., 106; 13 Sup. Ct., 261.
Philips vs. Harding, 70 Fed. Rep., 471."

"So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued."

Burgess vs. Seligman, *supra*, p. 33.

"When a question to be determined by the Su-
"preme Court is one of general law, it must be settled
"by a reference to all the authorities and not by the
"decisions of the highest state tribunal where the
"case arose. In such case the decisions of such state
"court are not binding. Baltimore & Ohio R. Co.
"vs. Baugh, 149 U. S., 368."

In this connection we call attention to Greenwood et al. vs. town of Westport, 63 Conn., 602.

It would clarify this discussion greatly if our friends would only remember that we are not contending for the ability of this petitioner to make the contract of guaranty in Connecticut, — we confess she could not, — but our contention is, that she could make it in Chicago, and that she did make it there, and that for that reason it was a valid contract.

We cannot forbear calling the attention of the court in reply to the new questions raised by counsel on their brief, pp. 21-25, to certain facts as follows:

That the respondent, a resident of Illinois, having a claim against the petitioner, a resident of the state of Connecticut, which it became necessary to litigate, having the right to choose between the federal courts and the courts of this state, chose the former, and brought its suit in the Circuit Court of the United States for the district of Connecticut, on the 30th day of December, 1895.

That on the 28th day of February, 1896, the petitioner made a voluntary assignment in insolvency under the statute law of Connecticut, and a trustee was appointed who took possession of all the property for the benefit of creditors, commissioners were appointed on her estate to receive and adjust claims, and it was necessary for the respondent to hand in its claim to said commissioners or be forever debarred from sharing in the assets of her estate. This the respondent did, without abandoning any right in the circuit court. This was not a voluntary act, but one made necessary by the act of the petitioner herself. The bank had no alternative. It had nothing upon which to predicate resistance to the state court.

In due course of procedure the question of the validity of this claim reached the Supreme Court of Connecticut, and was the question involved in the case, Freeman's Appeal, referred to by petitioner, which was decided February 23, 1897; subsequently on the day of June, 1897, the case pending in the circuit court was heard before Judge Townsend, the petitioner interposing no claim that the matter was already res judicata, and the case was tried upon the following answer:

"U. S. Circuit Court, District of Connecticut, May 26, 1897.

First National Bank of Chicago.

vs.

H. Drusilla Mitchell.

ANSWER.

1. Paragraphs 1 and 2 of the complaint are admitted.

2. Paragraph 3 is denied. Said writing Exhibit 'A' was signed by the defendant at her domicile in Bristol, in the state of Connecticut, and was not otherwise made, executed or delivered by her.

3. The defendant, at the time she signed said writing, was a married woman, the wife of George H. Mitchell of said Bristol, to whom she was married in 1857, at said Bristol where she then resided, and ever since has resided.

4. Paragraphs 4 and 5 are denied. Said co-partnership of Morse, Mitchell & Williams, at the time the said writing Exhibit 'A' was signed by the defendant, and prior thereto, was indebted to the plaintiff in a large sum, viz., $25,000, and more; and the plaintiff did not thereafter give said co-partnership additional credit, but such indebtedness was largely reduced.

T. M. MALTBIE,
Att'y for Defendant."

Upon this pleading the decision of the circuit court being for the petitioner, against the respondent, it took an appeal to the circuit court of appeals for the second circuit and no claim was there made that this question was already res judicata, and the decision of that court was in favor of the respondent, from which decision this writ of certiorari was brought to this court.

Even if there was anything in the claim of res judicata the petitioner is hardly entitled to avail herself of it. It is too late.